NO. 83156-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-SALGADO,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES

1) May a superior court judge order the taking of a cheek swab from a defendant for DNA analysis pursuant to CrR 4.7, rather than by issuing a search warrant, if the CrR 4.7 order is supported by probable cause and if there is a "clear indication" that the sample will provide evidence relevant to the case?

2) Was the order for the taking of a cheek swab from the defendant proper where there was probable cause to believe the defendant committed a sexual assault against an 11-year-old victim, and a "clear indication" that the DNA evidence would be present because the victim knew the defendant and reported that he pulled off his pants and her pajama pants, got into her bed, put his private part between her legs, and moved up and down for ten minutes, and because the defendant admitted to being in bed with the victim and kissing her on the mouth?

3) When the prosecution has discovered, after the case was affirmed by the Court of Appeals, that a material assertion by the trial prosecutor, relied upon by the trial court in ordering a DNA sample, was incorrect, can this Court affirm an order for DNA testing if the trial court's order was supported by probable cause and there was a clear indication that DNA evidence would be found, or must the case be remanded for additional factual determinations?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On November 25, 2006, the defendant, Alejandro Garcia-Salgado, was charged in King County Superior Court with Rape of a Child in the First Degree, for raping 11-year-old P.H. CP 1. He was also charged with a Violation of the Uniform Controlled Substances Act, possession of cocaine, for cocaine discovered in his pocket during a search incident to arrest. CP 1-2.

Prior to trial, on Friday, March 23, 2007, the State sought an order that Garcia-Salgado provide a cheek swab for DNA testing. RP (3/23/07) 3-4. At the same time, the trial date was continued. CP 123; RP (3/23/07) 5-7.[1] The motion requesting a DNA sample was set over to the following week due to the presiding court's congested docket. RP (3/23/07) 7.

Four days later, on Tuesday, March 27, the trial court heard the State's motion to collect a DNA sample from Garcia-Salgado. 1RP 2. At that hearing, the deputy prosecutor summarized her reasons for seeking a DNA sample from Garcia-Salgado. 1RP 2-3. One aspect of the prosecutor's presentation was incorrect. The prosecutor told the court that the Washington State Patrol Crime Laboratory (WSPCL) had conducted

[1] The transcript of this hearing was not produced until after the State filed its response brief in the Court of Appeals. It will be cited as RP (3/23/07).

preliminary testing on evidence when, in fact, that evidence was not received by the WSPCL until March 27, and no testing had yet occurred.[2]

After a number of unrelated continuances of the trial date, and a substitution of defense counsel, the case was assigned to Judge Richard Jones for trial. 2RP 1. Prior to trial, Garcia-Salgado pled guilty to the VUCSA charge. CP 19-36. A jury found Garcia-Salgado guilty of Rape of a Child in the First Degree as charged. CP 61A. The trial court sentenced Garcia-Salgado to an indeterminate sentence of 110 months to life on the rape charge. CP 94-106. This appeal followed. CP 107-20.

2. SUBSTANTIVE FACTS

In November, 2006, 11-year-old P.H. lived at home in Auburn, Washington with her mother, two brothers, and her two sisters. 4RP 28-29. Her older sister's boyfriend also lived with them, along with their two young children. 5RP 62-63; 5RP 30. A 13-year-old neighbor boy stayed with them at the house during this time. 6RP 15-17.

On November 25, 2006, a number of people were visiting the home, including the defendant, Alejandro Garcia-Salgado. 5RP 64-65; 6RP 16-17, 31-33. Although drinking was prohibited in the home, many guests were hanging out in the garage area drinking beer after P.H.'s mother went to bed. 5RP 65; 6RP 33-34, 55-56.

[2] The details of this misstatement are discussed below. *See infra*, pp. 15-16.

P.H. had earlier gone to bed in her brother's bedroom on an upper floor. 6RP 57-58. She was alone. 6RP 59. When most of the guests left the home to buy beer, Garcia-Salgado remained behind, waiting in the living room. 5RP 69. After the other adults left the home, P.H.'s adult sister heard Garcia-Salgado talking on his cell phone. She assumed that he then left the house and so went into her bedroom to be with her children. 6RP 33, 48. Meanwhile, another adult had fallen asleep on the living room couch. 6RP 17.

A short time after she had fallen asleep, P.H. was awakened by the sound and sight of Garcia-Salgado entering her bedroom. 6RP 58. She recognized him when she saw him flip open his cell phone, which provided enough illumination to see him in the darkened room. 6RP 58-59. Without speaking, Garcia-Salgado approached P.H. as she lay in her bed, removed her pajama pants, took off his own pants, and got on top of her, under the blanket. 6RP 60-62.

P.H. was "too scared" to speak or cry out. Garcia-Salgado started "going up and down" on top of her, putting his "private part" on her "private spot" for approximately ten minutes. 6RP 61-63. P.H. felt it hurting her, but was still too afraid to cry out or to talk. Finally, Garcia-Salgado finished, pulled up his pants, and left the room. 6RP 62-63, 66.

P.H. waited a few minutes, until she thought Garcia-Salgado had left the house. 6RP 67. She immediately found an adult, woke him up and – through tears – told him about the rape. 6RP 69. This adult then told P.H.'s adult sister what had happened. The sister immediately woke P.H.'s mother, who called the police. 4RP 38-40; 6RP 34-36.

Before the police arrived, two adults saw Garcia-Salgado try to escape through a garage window. They grabbed him by the neck, pulled him the rest of the way through the window, and held him for the police. 5RP 72-74; 6RP 36-39. Garcia-Salgado struggled with police, but they eventually placed him under arrest. 4RP 82-84. During a search incident to his arrest, cocaine was found in Garcia-Salgado's wallet. CP 4, 30.

In a post-arrest interview, Garcia-Salgado told Officer Raphael Sermeno that he had arrived at the house at about 8 or 9 p.m. He admitted to knowing P.H – whom he called the "young Indian girl," or "Indian short thing" – for about two years. 4RP 147-50, 160. He said he had been drinking and that he fell asleep on the couch when the others went to the store. 4RP 161. The next thing he claimed to remember was waking up in a bedroom on a bed. 4RP 161. Garcia-Salgado claimed that he woke up suddenly because P.H. was hugging him, as they lay on the bed facing one another. He said he had his clothes on, but did not remember if P.H. was clothed or not. He admitted to kissing her two times on the lips, but said

he "did not kiss her passionately" or "stick [his] tongue in her mouth." He denied having sex with her. 4RP 162-64.

Later that night, P.H. was taken by her mother to Mary Bridge Hospital for a sexual assault examination. 4RP 46. As part of the examination, nurses packaged P.H.'s clothing (pajama top and bottoms and underpants) and took swabs from her vaginal and anal areas. The entire "rape kit" was turned over to the police. 6RP 7-9.

These items were eventually submitted for DNA testing and comparison. A mixed sample of DNA was found on P.H.'s underpants. The female component of the sample matched P.H.'s DNA profile, and the male component matched Garcia-Salgado's DNA profile. 5RP 146-49. P.H.'s shirt also contained semen with a DNA profile that matched Garcia-Salgado's DNA profile. 5RP 150-53. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile was 1 in 13 trillion. 5RP 149, 53.

Garcia-Salgado appealed his conviction, arguing that the trial court should not have authorized the taking of his DNA without following the procedures for obtaining a search warrant. The Court of Appeals rejected this argument and held that the information presented to the trial court was sufficient to establish probable cause for the cheek swab. State v. Garcia-Salgado, 149 Wn. App. 702, 205 P.3d 914 (2009).

C. ARGUMENT

Petitioner Garcia-Salgado argues that the trial court violated the state and federal constitutions by ordering the taking of a DNA sample. He claims that a DNA sample can be taken only pursuant to a search warrant, that the trial judge was not a "neutral magistrate," and that the order in this case does not comply with the "oath or affirmation" requirement of CrR 2.3. Pet. for Rev. at 9-14. These arguments should be rejected. An order of the superior court, supported by probable cause and a clear indication that there is reason to take a sample from the defendant, provides the "authority of law" required by article 1, § 7 of the Washington constitution to take a DNA sample. The Court of Appeals should be affirmed in this regard.

Garcia-Salgado also argues that the trial court did not have a proper basis to order the taking of a cheek swab under the facts of this case. Pet. for Rev. at 13-14. After review was accepted in this Court, the State discovered that the trial prosecutor incorrectly told the trial court that the WSPCL had begun testing evidence when, in fact, it had not. Appendix A (Letter, dated December 15, 2009).[3] This fact was material to the trial court's order. Even after excising this inaccuracy, however,

[3] This letter is not a part of the appellate record but the parties agree that it may be considered by the Court.

the trial court's order remains proper because the evidence in the record supports a finding that a cheek swab was warranted. If this Court determines that the existing record is insufficient to reach this conclusion, the State respectfully requests the matter be remanded to the Superior Court for proceedings consistent with this Court's opinion.

1. A SUPERIOR COURT JUDGE MAY ORDER THE TAKING OF A DNA SAMPLE PURSUANT TO CrR 4.7.

Garcia-Salgado asserts that a court rule is not "authority of law" within the meaning of the state constitution, and that only a search warrant will suffice to obtain a DNA sample. He is mistaken.

Article 1, § 7 provides that "no person may be disturbed in his private affairs without authority of law." CrR 4.7 allows the trial court in a criminal case, on the motion of the prosecuting attorney to "require" a defendant to ". . . permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body. . . which involve no unreasonable intrusion thereof." CrR 4.7(b)(2)(vi).

This Court has repeatedly held that the "authority of law" to search required under the constitution may derive from a number of sources, not solely from the authority to issue a search warrant. First, this Court has specifically recognized that court rules can provide the requisite "authority of law" to justify a search. State v. Gunwall, 106 Wn.2d 54, 68-69, 720

P.2d 808 (1986) ("Generally speaking, the "authority of law" required by Const. art. 1, § 7 in order to obtain [telephone] records includes authority granted by a valid, (i.e., constitutional) statute, the common law or a rule of this court.").

Moreover, in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), this Court specifically recognized that the superior court criminal rules provide the authority of law to take biological samples. The issue in Gregory was whether police may use a DNA profile obtained in a previous rape investigation and compare that profile to evidence obtained in a separate murder case. This Court began its analysis by observing that "Criminal Rule (CrR) 4.7(b)(2)(vi) allows the court, on a motion from the prosecuting attorney, to order the taking of a blood sample from the defendant. CrR 4.7(b)(2) is subject to constitutional limitations." State v. Gregory, 158 Wn.2d at 822.

The Court then went on to discuss the constitutional limits of such orders, and said: "First, there must be a 'clear indication' that in fact the desired evidence will be found. . . [and] [t]he chosen test must also be reasonable and it must be performed in a reasonable manner." Gregory, at 822-23 (quoting Schmerber v. California, 384 U.S. 757, 770-72, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) and citing United States v. Wright, 215 F.3d 1020, 1025 (9th Cir.), *cert. denied*, 531 U.S. 969, 121 S.Ct. 406, 148

L.Ed.2d 313 (2000) and State v. Judge, 100 Wn.2d 706, 711-12, 675 P.2d 219 (1984)). Thus, constitutional requirements are satisfied if there is probable cause that supports the collecting of biological evidence from the defendant, if there is a clear indication that the desired evidence will be found, and if the test itself is reasonable and performed in a reasonable manner. Nothing requires that these determinations be made *only* pursuant to the search warrant process.

This Court has previously rejected the converse of Garcia-Salgado's position, i.e., that a blood sample may be taken *only* through compliance with the court rules, and after notice and an opportunity to be heard. State v. Kalakosky, 121 Wn.2d 525, 532-36, 852 P.2d 1064 (1993). In considering the defendant's challenge, this Court stated:

> The trial court reasoned that the criminal discovery rule may be utilized after a proceeding has been initiated; in the investigative stage (while the defendant was on a parole hold and not yet charged) a search warrant supported by probable cause was an appropriate vehicle to obtain a blood test. We agree.

Kalakosky, 121 Wn.2d at 533. This Court went on to hold that there was nothing about taking blood that required *more* than an independent magistrate's determination of probable cause. Id. at 534. "Washington case law has focused on the existence of probable cause when considering the propriety of warrants authorizing the taking of blood samples." Id. at

535 n.12 (citing State v. Bockman, 37 Wn. App. 474, 487, 682 P.2d 925 (1984)); State v. Osborne, 18 Wn. App. 318, 321, 569 P.2d 1176 (1977); State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991) (rejecting defendant's argument that his article 1, § 7 rights were violated when his blood was taken over his objection)).

Garcia-Salgado primarily relies on cases where searches were conducted by police officers or other state agents acting wholly without judicial supervision. It is axiomatic that under such circumstances, private affairs can be disturbed only pursuant to a warrant, or some recognized exception to the warrant requirement. Nothing in the language or holdings of any of the cases cited by petitioner forecloses a search conducted pursuant to a court order authorized by a court rule.

Moreover, petitioner's argument simply ignores the fact that "authority of law" to search has been found in a number of different contexts. For instance, a legal arrest provides the authority of law to perform a warrantless search. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (quoting State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003)). This Court has also pointed out that a subpoena authorized by statute, and subject to judicial review before issuance, would satisfy the "authority of law" requirement. State v. Miles, 160 Wn.2d 236, 251 n.8, 156 P.3d 864 (2007) ("The warrant process, or

the opportunity to subject a subpoena to judicial review, also reduces mistaken intrusions."). The taking of a biological sample may also be effectuated directly by statute. State v. Olivas, 122 Wn.2d 73, 96, 856 P.2d 1076 (1993) (mandatory DNA testing for felons required by statute). Thus, it is difficult to find any support for Garcia-Salgado's novel assertion that a court must use search warrant procedures, instead of a judicially approved and supervised court rule, to order the taking of a DNA sample after criminal charges have been filed.

Not only is Garcia-Salgado's argument unsupported by authority, it is unsupported by logic and common sense. In fact, one might wonder why a *trial* defense attorney would insist upon a warrant instead of an order pursuant to CrR 4.7. Numerous protections exist for the defendant at a pretrial discovery hearing *that do not exist* when a warrant is requested and obtained by police. A court order is actually more protective of the defendant's rights than is a search warrant.

First, the defendant is appointed counsel upon charging and, thus, must be represented by counsel at a CrR 4.7 hearing. *See* CrR 3.1. In contrast, search warrants are obtained *ex parte*, where neither the defendant nor his lawyer is present.

Second, an order pursuant to CrR 4.7 is issued after an adversarial hearing. At the hearing, defense counsel can challenge the State's factual

assertions, provide evidence of his own, or call witnesses. No adversarial hearing occurs when a search warrant is obtained, so there is no opportunity for a defendant to challenge or supplement the State's factual predicate for a probable cause determination.

Third, a verbatim record is made of the superior court proceeding, whereas search warrant affidavits are presented *ex parte*, and the only record is the affidavit, the warrant, and a return of service. The recording and filing requirement that pertains to warrants is not more protective than the verbatim recording made of a CrR 4.7 hearing.

Fourth, the superior court judge who authorizes the warrant is in a better position to know that the order is supported by probable cause because defense counsel has read the discovery and can challenge the State's claims. *See* RP 3/23/07 at 3 (challenging evidence of penetration).

For all these reasons, the adversarial process authorized by CrR 4.7 is at least as protective of the defendant's rights as is the search warrant process. Garcia-Salgado's arguments are not supported by authority or logic, and should be rejected.

2. THE ORDER WAS VALID BECAUSE THE FACTS ESTABLISH PROBABLE CAUSE AND A "CLEAR INDICATION" THAT DNA WOULD BE FOUND.

a. Relevant Facts.

Garcia-Salgado was charged with one count of rape of a child in the first degree. CP 1. At the time of filing, the State filed a sworn Certification for Determination of Probable Cause to support the charge. CP 3-4 (attached as Appendix B to this brief).

On March 23, 2007, with the Honorable Palmer Robinson presiding, the State moved, pursuant to CrR 4.7, for an order requiring Garcia-Salgado to provide a cheek swab for DNA testing. RP (3/23/07) 2. The prosecutor introduced the case, noted that several issues were pending, discovery was continuing, and then said:

> . . . *I have confirmed with the lab as of yesterday they are in the process of doing DNA testing, on this case. There was, there are other tests that were already performed, presumptive tests that were performed by the lab, I've made sure that someone's been assigned for DNA analysis.* The detective did not get a DNA swab from the defendant. I have e-mailed defense counsel about whether or not he is willing to help the detective facilitate that or whether a motion needs to be set to get the defendant's DNA swab for the DNA testing.
>
> It will take at least four weeks to get the DNA results. That would be if we got the defendant's swab, as well, in the next week.

RP (3/23/07) 3-4 (emphasis added).[4] The parties and the court discussed hearing dates and trial dates and defense counsel then noted that he objected to the taking of a DNA sample from the defendant. RP (3/23/07) 7. The matter was continued until the following week because a substantive motion could not be heard on the omnibus calendar.

On Tuesday, March 27, 2007, the parties convened again before the Honorable Palmer Robinson to consider the DNA discovery motion. The prosecutor summarized the issues and her representations from the last hearing, and defense counsel noted an objection based on the assertion that discovery showed a lack of vaginal penetration. 1RP 2-4. The State reiterated that a full rape kit had been done and then the following exchange took place.

> Court: And *do you know if those swabs have been analyzed to find DNA other than the alleged victim's*?
>
> Pros.: Your Honor, the way it works is: the lab does a presumptive test, and then, based on the results of the presumptive test, determines whether or not it's appropriate to take the next step, the most expensive step, of doing a DNA test.
>
> Court: All right.
>
> Pros.: *I believe the presumptive tests were done, and there was something on them; I couldn't say exactly what at this point in time.*

[4] Extended quotations from the record of this hearing and the March 27th hearing are attached as Appendix C for this Court's convenience.

> Court: All right. I don't, I do find that the DNA swab is minimally intrusive . . . And I am ordering that, under Criminal Rule Number 4.7(b)(2)(6) . . . That Mr. Garcia-Salgado cooperate in the taking of an oral swab, for purposes of DNA analysis.

1RP 4-5 (emphasis added); CP 6.

The case detective took a cheek swab from Garcia-Salgado in the court's presence immediately following the order. 2RP 5-7. The swab was submitted to the WSPCL where DNA was extracted and compared to stains found on the victim's underwear and pajama top. Garcia-Salgado's DNA matched DNA found on those two garments. 6RP 149-50.

After review was granted by this Court and briefs were being prepared, it came to the attention of the appellate prosecutor that the WSPCL had not received the rape kit and the victim's clothing until March 27, 2007. Appendix A. Thus, it would have been impossible for the laboratory to have conducted any preliminary tests on the items before that date. The trial prosecutor's statement to the court – that such testing had been done – was not correct. In light of this discovery, the appellate prosecutor promptly notified counsel on appeal for Garcia-Salgado, Mr. Gregory Link, of this incorrect material assertion. The parties jointly requested a continuance to assess the effect of this new information on Garcia-Salgado's appeal.

b. The Court's Order Was Supported By Probable Cause And By A "Clear Indication" That DNA Evidence Would Be Found.

As outlined above, a biological sample may be taken from a criminal defendant if there is a "clear indication" that evidence will be found, the request is reasonable, and the sample will be taken using reasonable means. State v. Gregory, 158 Wn.2d 822-23.

This test cited in Gregory was originally developed in cases where the taking of a bodily sample required a physical intrusion under the skin into the subcutaneous tissues of the body. Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 5.3(c), at 171-77 (4th ed. 2004) (discussing Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)). Schmerber dealt with a blood draw in a vehicular assault case. The Court held that a search involving an intrusion into the body ordinarily requires a warrant and a showing beyond mere probable cause to believe a crime has been committed. To justify an intrusion into the body, there must be a "clear indication" that the intrusion will yield relevant evidence. Schmerber, 384 U.S. at 769-70. In Schmerber, the Court ultimately held that dissipation of alcohol in the body created an exigent circumstance that justified a warrantless blood draw. Id. at 770-72. Thus, the analysis previously applied by this Court in Judge and Gregory should be used in this case.

The rapid advancement of DNA analysis over the past decade has substantially increased the likelihood that DNA evidence will be found at a crime scene – especially where there was direct physical contact between the suspect and the victim – suggesting that in many circumstances the Gregory test will be met. *See generally* Michaelis, R. Flanders, & P. Wulff, A Litigator's Guide to DNA 341 (2008); John M. Butler, Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers 33-41 (2nd ed., Elsevier Academic Press 2005). It is now well understood that even minute amounts of DNA can be detected through forensic analysis. State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007) (licked envelope). Mere contact of the defendant's skin with an item of clothing can leave behind DNA evidence. State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009) (hat found at crime scene might contain DNA). DNA evidence can also come from minute epithelial cells or small amounts of other bodily fluid left behind by the suspect; spermatozoa or semen is not required. State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009) (DNA from saliva or shredded skin cells). Numerous examples appear in published appellate decisions. *See e.g.,* In re Pers. Restraint of Bradford, 140 Wn. App. 124, 130-31, 165 P.3d 31 (2007) (mask worn during rape); State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007) (trace DNA found on exhumed bodies, blood on automobile carpets, and from

hairs); State v. Roberts, 142 Wn.2d 471, 480, 14 P.3d 713 (2000) (DNA from cigarette butt); State v. Bander, 150 Wn. App. 690, 208 P.3d 1242 (2009) (DNA from cigarette butt and adhesive tape). This increased sensitivity and power of detection substantially increases, even as compared to a decade ago, the likelihood that DNA evidence will be found on a rape victim.

One would easily conclude that there is a "clear indication" that the defendant's DNA would be found on either the rape kit or on the victim's clothing (pajama top or underwear) in this case. Garcia-Salgado admitted to being in bed with an 11-year-old victim without her parent's knowledge or permission, intertwined in an embrace. He admitted to not knowing whether she was clothed or not. He admitted to kissing the 11-year-old on the lips as she lay in her bed. The victim told police that she clearly saw the defendant enter her bedroom, saw him remove his own pants and her pajama pants, and saw and felt him as he climbed on top of her, pressing his penis against her private area. The victim felt pain as Garcia-Salgado rubbed up and down against her for approximately ten minutes, and she said that he had penetrated her. The victim immediately reported the assault, the defendant was immediately apprehended, the victim's clothing was promptly gathered, and a rape kit was taken shortly after the assault. CP 3-4.

Under these facts, there is certainly probable cause to believe that the defendant committed a sexual assault against the victim, and it was quite likely that DNA would be found on the rape kit or the victim's clothing. The "clear indication" test adopted and consistently applied by this Court in Judge, Kalakosky, and Gregory has been met under these circumstances.[5]

Unfortunately, as indicated above, the prosecutor also offered incorrect information to the trial court about what laboratory testing had occurred prior to March 23rd and 27th. The prosecutor stated that the WSPCL had begun analysis of the evidence and had obtained preliminary results when, in fact, the WSPCL did not receive the physical evidence until March 27th.

In State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001), this Court discussed the procedures that should be followed when evidence is obtained pursuant to a flawed search warrant. Although there appears to be no case discussing the procedures to be followed when a court relies on false information in ordering a search pursuant to CrR 4.7, it seems appropriate that the same procedures should be followed in these circumstances as well. The process is as follows:

[5] Garcia-Salgado does not claim that the cheek swab was an unreasonable means for obtaining a DNA sample.

> If a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Gore, 143 Wn.2d at 296 (quoting Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). This Court also held that:

> Allegations of negligence or innocent mistake are insufficient. . . . If the defendant makes this preliminary showing, and at the hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether as modified the affidavit supports a finding of probable cause. . . . If the affidavit fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it excluded.

Id. at 296-97 (citations omitted). This Court has confirmed that the analysis (often referred to as a "Franks hearing") is consistent with article 1, § 7. State v. Chenoweth, 160 Wn.2d 454, 470-79, 158 P.3d 595 (2007).

Applying that standard to this case, and conceding that the prosecutor's assertion that testing had begun was incorrect, probable cause still existed for the court's order even after the information about the status of the laboratory work is excised. As outlined above, the victim identified Garcia-Salgado, a man she knew, as the perpetrator of a sexual assault against her. She described how Garcia-Salgado rubbed and pressed his body against her clothing and against her body for about ten minutes. This

provided a clear indication that a DNA sample would lead to evidence against the defendant, even absent preliminary screening of the evidence.

c. If This Court Finds The Record To Be Deficient, The Case May Be Remanded To Create A More Complete Record.

Unlike the requirement in some criminal rules, written findings of fact and conclusions of law are not mandatory when a court issues an order pursuant to CrR 4.7. *Compare* CrR 4.7 *with* CrR 3.5(c), 3.6(b), 6.1(d), 7.5(d), 8.3(c)(4) and JuCR 7.11(d). The trial court in this case entered a written order but it did not explain its reasoning in findings of fact and conclusions of law. CP 6. Garcia-Salgado suggests that the trial court's order was insufficient because the court did not expressly state that it had found probable cause to order the taking of the cheek swab. This argument does not provide a sufficient reason to reverse because, as discussed above, an objective review of the certification of probable cause establishes that the order was appropriate.

However, should this Court decide that the trial court must specifically articulate the basis for its ruling, the appropriate remedy would be to remand the case to the superior court for additional findings. State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995); State v. Charlie, 62 Wn. App. 729, 815 P.2d 819 (1991).

Finally, Garcia-Salgado may allege governmental misconduct and ask this court to remand for dismissal of charges under some such theory. That claim, if made, should be rejected. To justify dismissal of a criminal charge under CrR 8.3(b), a defendant must show arbitrary action or governmental misconduct that prejudiced his right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). However, no such claim can be considered or adjudicated at this stage because there is no record upon which to evaluate what exactly occurred, and why. Moreover, on the existing record it appears that Garcia-Salgado was not prejudiced even if there was misconduct.

D. CONCLUSION

For the foregoing reasons, this Court should hold that a trial court is permitted to order the taking of a DNA sample pursuant to CrR 4.7, and that a search warrant may be used to accomplish this result but is not mandatory. This Court should also hold that the trial court's order was supported by probable cause that Garcia-Salgado had committed a sexual assault against the victim, and that there was a clear indication that DNA

evidence would be found. Alternatively, this Court may remand for an evidentiary hearing for the trial court to enter additional factual findings.

DATED this 15th day of January, 2010.

Respectfully submitted,

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APPENDIX A

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December 16, 2009

RE: State v. Garcia-Salgado, S.Ct. No. 83156-4

Dear Mr. Link,

This letter is to inform you that I have discovered some information that is likely relevant to your appellate claims, but that appears to have gone unnoticed up to this point in the appellate process.

While doing a detailed background investigation into this case yesterday, I learned that the Washington State Patrol Crime laboratory appears to have received the evidence in this case on 3/27/07, four days after the omnibus hearing, and the same day as the hearing wherein the court authorized a cheek swab be taken. Since the evidence had not been received before 3/27/07, it appears that there was no testing done by the lab before that date. Thus, the prosecutor's statements, that presumptive tests had been done as of 3/27/07, appear to have been incorrect. This information was used by the trial court to authorize taking the cheek swab from your client.

I have not completed looking into this matter but, since we both have to file briefs by Friday, I wanted to alert you to this new factual information as soon as possible.

Please call me at your earliest convenience so that we can discuss the appropriate next steps. At this point, I believe it is in the interest of both parties to request additional time to consider this new information and its impact on the appeal. I apologize for any inconvenience this causes but I was not aware of this information until yesterday, December 15, 2009.

Sincerely,

James M. Whisman
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
King County Prosecutor's Office
206-296-9660

APPENDIX B

06-1-12255-7 KNT

Cause Number:

Auburn Police Department
Certification of Probable Cause

That I, James Hamil, am a Detective with the Auburn Police Department and I have reviewed the investigation conducted by the Auburn Police Department under Case # 06-14463

There is probable case to believe that Alejandro Garcia-Salgado 032888 (18 y/o) has committed the crime(s) of:

1. Offense: Rape of a Child 1st Degree
2. Offense: VUCSA-Possession of Cocaine

This belief is based on the following facts and circumstances:

On 112506 at about 0206hrs Auburn Police Officers Millan, Arneson, Hostetter, were dispatched to a rape that had just occurred at 1402 Ginkgo ST SE Auburn King County Washington. Witness Joylene Simmons reported that the suspect, a late teen Hispanic male, was still on location but was attempting to leave. Officer Millan and witness, Pablo Cruz-Guzman contacted suspect, Alejandro Garcia-Salgado, as he was exiting a garage window and after a brief struggle he was detained.

Simmons said that a few minutes prior her 11 y/o daughter, PH 081995, reported on separate occasions to Simmons's other children Rachel Jerry and 13 y/o son, CA 052994 that "Alex" had pulled her pants down. When asked if he put his "thing" or "penis" inside her, PH said "Yes". Simmons, Jerry, and CA provided written statements. They advised that PH was upset and crying as she made her disclosures.

Jerry and Cruz-Guzman are married and Garcia-Salgado is a friend of Cruz-Guzman. Cruz-Guzman provided a statement that earlier in the evening he went and got his friend, Garcia-Salgado, from his house in Federal Way to get some money that Garcia-Salgado owed Cruz-Guzman. They decided to return to Auburn and drink beer. Cruz-Guzman left Garcia-Salgado at the house and left to get more beer. When Cruz-Guzman returned Jerry said that Garcia-Salgado had just had sex with PH. Cruz-Guzman helped stop Garcia-Guzman as he was trying to leave and asked him what he had done. Garcia-Guzman repeatedly said nothing.

Officer Arneson briefly talked with PH with Simmons present. PH said that Garcia-Salgado came into her room and pulled down her pants. She said that she tried to stop him but he was able to pull them down. PH said that he pulled down his pants and laid on top of her on the bed. She said that he moved his body back and forth on top of her for a few minutes before he stopped. PH got up and went and told Jerry and CA what happened.

In a post Miranda statement to Spanish speaking Officer Sermeno, Garcia-Salgado said that he had come over to the home to drink beer and became very intoxicated. He said that he remembers waking up in the bed with PH and remembers kissing her on the lips two times, but not in a sexual or romantic way. He said that he did not have sex with her. He referred to PH as a "young girl" and a "short, thin, young Indian girl".

When Garcia-Salgado was being booked into the Auburn Jail, 25 W Main ST Auburn King County Washington, Corrections Officer Tim Schlecht conducted an inventory of Garcia-Salgado's wallet. In a folded dollar bill Officer Schlecht found a white powder, suspected cocaine, total weight 1.01 grams. Officer Schlecht turned the bill and contents over to Officer Hostetter who conducted a field test of the suspected cocaine using field test protocols set by the WSP Crime Lab. The test was positive for cocaine.

Under penalty of perjury, under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated on 112806, at Auburn, Washington.

Signature

CAUSE NO. 06-1-12255-7 KNT

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause written by Detective James Hamil of the Auburn Police Department for incident #06-14463 and signed on November 28th, 2006.

REQUEST FOR BAIL

The State requests bail in the amount of $50,000, and a no contact order with the victim, P.H. (d.o.b. 8-19-95). The State further requests that the court prohibit the defendant from having contact with any other minors. Unfortunately, the defendant's criminal history was not available at the time of this filing, nor was any information available regarding the defendant's prior attendance at scheduled court appearances. However, it is worth noting that the Certification mentions that the defendant was intoxicated to the point of passing out, and also had cocaine in his wallet. Under the circumstances, the State suggests the court also order the defendant to obtain a substance abuse evaluation and follow all recommended treatment as a condition of his release.

Richard L. Anderson, WSBA #25115

Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

APPENDIX C

Friday, March 23, 2007

Pros.: . . . *I have confirmed with the lab as of yesterday they are in the process of doing DNA testing, on this case. There was, there are other tests that were already performed, presumptive tests that were performed by the lab, I've made sure that someone's been assigned for DNA analysis.* The detective did not get a DNA swab from the defendant. I have e-mailed defense counsel about whether or not he is willing to help the detective facilitate that or whether a motion needs to be set to get the defendant's DNA swab for the DNA testing.

It will take at least four weeks to get the DNA results. That would be if we got the defendant's swab, as well, in the next week.

RP (3/23/07) 3-4. After some additional discussion of scheduling matters, defense counsel said:

Def: I am inclined to agree with the State in terms of the representations here. I did speak with my client about a continuance and I think that he was okay with that; however we only talked about a two or three week continuance. I think the DNA matter changes things a bit. . . .

It looks to me like there will be DNA experts and I will need time to interview them, as well, and I hadn't considered that when I spoke with [the defendant] yesterday.

RP (3/23/07) 5.

Tuesday, March 27, 2007

Pros.: As your Honor will remember, we had omnibus on this case last Friday. . . . I indicated to the Court a rape kit was done of the 11-year-old victim, . . . And I also told the Court it had come to my attention we did not have a DNA sample from the defendant. . . .

* * *

Def.: And, your Honor, we simply object, based on my client's interests in his privacy, and we feel that this is an unreasonable intrusion of his privacy and his person. Given the situation, after interviewing the doctor who had examined the alleged victim, an 11 year-old girl. . . the doctor indicated that he found no actual, physical evidence of penile-vaginal penetration. . . . Given the doctor's findings, we feel that this, to coin a phrase, is a fishing expedition, and, therefore, we do object, your Honor.

Court: This would involve a swab on the inside of Mr. Garcia-Salgado's mouth?

Def.: That's correct, your Honor.

Court: All right. Do you have a response to Mr. Gaer's. . .

Pros.: Your Honor, the victim indicates that she believes the defendant was having sex with her, even if there was not actual -- . . . . even if there was not actual penetration, DNA could have been left in her vaginal area. . . . A full rape kit was done, and swabs were taken of that area.

Court: And *do you know if those swabs have been analyzed to find DNA other than the alleged victim's*?

Pros.: Your Honor, the way it works is: the lab does a presumptive test, and then, based on the results of the presumptive test, determines whether or not it's appropriate to take the next step, the most expensive step, of doing a DNA test.

Court: All right.

Pros.: *I believe the presumptive tests were done, and there was something on them; I couldn't say exactly what at this point in time.*

Court: All right. I don't, I do find that the DNA swab is minimally intrusive . . . And I am ordering that, under Criminal Rule Number 4.7(b)(2)(6) . . . That Mr. Garcia-Salgado cooperate in the taking of an oral swab, for purposes of DNA analysis.

1RP 2-5; CP 6.

Certificate of Service by E-Mail

Today I sent by electronic mail directed to Gregory Link, the attorney for the Petitioner, at greg@washapp.org, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in State v. Garcia-Salgado , Cause No. 83156-4, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name Wynne Brame
Done in Seattle, Washington

1/15/10

Date 1/15/2010

ORIGINAL